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Supreme Court, U.S.  
**FILED**  
**SEP 20 1991**  
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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

\_\_\_\_\_  
NO. 91-5655  
\_\_\_\_\_

JOSEPH ROGER O'DELL, III,

Petitioner,

v.

CHARLES E. THOMPSON, WARDEN, ET AL.,

Respondent.

\_\_\_\_\_  
RESPONDENT'S BRIEF IN OPPOSITION  
\_\_\_\_\_

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QUESTION PRESENTED

ARE ALL THE PETITIONER'S UNDERLYING  
HABEAS CLAIMS BARRED BY HIS PROCEDURAL  
DEFAULT DURING HIS STATE HABEAS  
PROCEEDINGS?

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RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On February 5, 1985 the petitioner raped, sodomized and murdered Helen Schartner in Virginia Beach, Virginia. The victim had been strangled manually and also had been struck several times on the head with a pistol. A tire track found at the scene was similar to tires on the petitioner's car. The following day the petitioner arrived exhausted at his former girlfriend's house. Thereafter the girlfriend found clothing soaked in blood in her garage and turned it over to the police. Blood on the clothing was matched with that of the victim using the technique of electrophoresis. The petitioner, while incarcerated, told another inmate that he had in fact committed the murder.

Petitioner was convicted of capital murder on September 10, 1986. Then, in a sentencing hearing before a jury he was sentenced to death on November 13, 1986. His conviction was affirmed by the Virginia Supreme Court in 1988. O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491 (1988). This Court thereafter denied O'Dell's petition for writ of certiorari. 448 U.S. 871 (1988).

A petition for a writ of habeas corpus was filed in the Circuit Court for the City of Virginia Beach in May, 1989. After affording O'Dell a one-day evidentiary hearing, the court dismissed the petition, entering its final order on November 26, 1990.

Thereafter, the Petitioner failed to file a timely Petition for Appeal to the Virginia Supreme Court. On April 1, 1991 the Virginia Supreme Court denied Petitioner's Motion to File a Late Petition. (A95). On that same day the court rejected the proffered petition for appeal for failure to comply with Rule 5:17(a)(1) of the Rules of the Supreme Court of Virginia. That provision requires that an appeal from a trial court be filed within three months of entry of the order appealed from. (A7). On June 7, 1991 the Court denied a Petition for Rehearing of that Denial. (A97).

#### REASON WHY THE PETITION SHOULD BE DENIED

##### The State Procedural Bar Applied In This Case Has Been Upheld Recently By This Court

Petitioner concedes that "a question of federal law dismissed by a state court judgment pursuant to independent and adequate state rule of procedure forecloses this Court's ability to review the federal question." (Petition 42). This concession, however, was mandated by this Court's recent decision in Coleman v. Thompson, 111 S.Ct. 2546 (1991). Coleman clearly controls this case and all of O'Dell's claims are barred from federal review by his failure to perfect a timely state habeas appeal.

The claim that the Virginia Supreme Court's dismissal of O'Dell's petition for appeal was not independent of federal law is meritless. Upon discovery of his error in failing to file a timely petition for appeal, petitioner filed a motion in the Virginia Supreme Court asking for permission to file a late petition or to supplement the "assignments of error" he had previously filed. There is absolutely no reason to believe that the Virginia Supreme Court made any "antecedent ruling on federal law" in denying the motion and enforcing its procedural bars. The dismissal was based on the clear and explicit statement in Rule 5:17(a) of the Rules of the Supreme Court of Virginia that the petition must be filed within three months of the entry of judgment. (A7). Under Rule 5:5(a) "the times prescribed for filing...a petition for appeal (Rules 5:17(a)...)...are mandatory." (See copy attached hereto).



The mere fact that O'Dell failed to file a timely petition for appeal, as opposed to a late notice of appeal, does not distinguish this case from Coleman. It is true that this Court pointed out that Commonwealth's reliance on Tharp v. Commonwealth, 211 Va. 1, 3, 175 S.E.2d 277, 278 (1970) because his case involved a notice of appeal rather than a petition. 111 S.Ct. at 2561. This Court also stated, however, that Tharp did not stand for the principle that the Virginia Supreme Court "will conduct at least a cursory review of a petitioner's constitutional claims on the merits before dismissing an appeal." 111 S.Ct. at 2560. This Court stated that "[a] more natural reading is that the Virginia Supreme Court will only grant an extension of time if the denial itself would abridge a constitutional right. That is, the Virginia Supreme Court will extend its time requirement only in those cases in which the petitioner has a constitutional right to have the appeal heard." 111 S.Ct. at 2560 (emphasis added).

Here, the Virginia Supreme Court's denial of O'Dell's request for an extension of time to file a petition appeal did not in any way violate the petitioner's constitutional rights. A prisoner has no constitutional rights to state habeas proceedings and no right to the effective assistance of counsel if such proceedings are afforded by the state. Pennsylvania v. Finley, 481 U.S. 551, 556-557 (1987).

Petitioner's inability to follow the Rules of the Virginia Supreme Court does not warrant certiorari review of the Virginia Supreme Court's dismissal order, which was clearly based on an

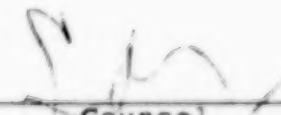
adequate and sufficient state ground. Since the instant proceeding is a direct review of the Virginia Supreme Court's judgment, this Court is without jurisdiction to review O'Dell's habeas claims.

#### CONCLUSION

The petitioner has failed to demonstrate "any special or important" why this case should be reviewed on certiorari. U.S.S.Ct.R. 10. For this reason, the petition should be denied.

Respectfully submitted,

CHARLES E. THOMPSON, WARDEN, ET AL.,

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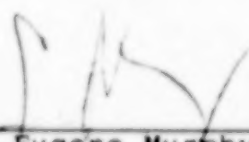
v.

CHARLES E. THOMPSON, WARDEN, ET AL.,

Respondents.

CERTIFICATE OF SERVICE

I, Eugene Murphy, a member of the bar of this Court, hereby certify that on this \_\_\_\_ day of September, 1991, a copy of the foregoing respondents' brief in opposition was mailed to Robert S. Smith, Esquire, 1285 Avenue of the Americas, New York, New York 10019-6064, counsel for petitioner. I further certify that all parties required to be served have been served.

  
\_\_\_\_\_  
Eugene Murphy  
Assistant Attorney General

**Rule 5:5. Extension of Time; Filing by Mail.**

(a) The times prescribed for filing the notice of appeal (Rules 5:9(a), 5:14(a) and 5:21(c)), the transcript or written statement (Rule 5:11), a petition for appeal (Rules 5:17(a) and 5:21(g)) and a petition for rehearing (Rules 5:20 and 5:39), are mandatory. The time period for filing the notice of appeal is not extended by the filing of a motion for a new trial, a petition for rehearing, or a like pleading unless the final judgment is modified, vacated, or suspended by the trial court pursuant to Rule 1:1 or a petition for rehearing is filed in the Court of Appeals. In any such case the time for filing shall be computed from the date of final judgment entered following such modification, vacation, or suspension, or from the date the Court of Appeals refuses a petition for rehearing or enters final judgment following the granting of such a petition.

(b) Any document required to be filed with the clerk of this Court, or filed in the office of the clerk of this Court, shall be deemed to be timely filed if it is mailed postage prepaid to the clerk of this Court by registered or certified mail and if the official receipt therefor be exhibited upon demand of the clerk or any party and it shows mailing within the prescribed time limits. This rule does not apply to documents to be filed in the office of the clerk of the trial court or clerk of the Industrial Commission or clerk of the State Corporation Commission.